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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 915

FEDERAL POWER COMMISSION, PETITIONER

v.

METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, THE CLARION RIVER POWER COMPANY, AND SOLAR ELECTRIC COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Third Circuit is reported in 94 F. (2d) 943.

JURISDICTION

The decree of the Circuit Court of Appeals sought to be reviewed was entered on January 27, 1938 (R. 62). The petition for certiorari was filed on April 1, 1938, and was granted on April 28, 1938.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Was the order of the Federal Power Commission of January 26, 1937, an appealable order under Section 313 of the Federal Power Act, so that the Circuit Court of Appeals had authority under Section 262 of the Judicial Code to issue an injunction in aid of its appellate jurisdiction in respect of such order?

2. Assuming that the Circuit Court of Appeals had jurisdiction to render a decree in these circumstances, did it properly exercise its judicial power in issuing a decree enjoining the proffer of evidence at a hearing before a trial examiner of an administrative agency on the ground that the evidence is not relevant to the issues to be determined at the hearing?

STATUTES INVOLVED

The statutory provisions involved in this case are Section 262 of the Judicial Code and Sections 209, 301 (c), 307, 311, and 313 of the Federal Power Act, which are printed in the Appendix, *infra,* pages 26–31.

STATEMENT

Acting on its own motion the Federal Power Commission on January 6, 1936, undertook an investigation into the ownership, operation, manage-

ment, and control of the respondents and into contracts and working arrangements between the respondents and their affiliates (R. 23). This investigation was undertaken under the authority of Sections 301 (c), 307, and 311 of the Federal Power Act.

The Commission issued an "order of inquiry" to respondents directing them to make available for the examination of the Commission's representatives their books, accounts, memoranda, and records, and also the books and papers of their affiliates (R. 23–24). The respondents complied with this order in part, but denied to the Commission's representatives access to the books and papers of certain persons, whom respondents claimed were non-affiliates (R. 42–45). The information gathered by the Commission's representatives was embodied in a report to the Commission, dated December 10, 1936 (R. 2, 45).

In order to obtain the information refused to the Commission's representatives, the Commission, on January 26, 1937, issued an order and notice of a joint hearing to be held on March 3, 1937, before the Federal Power Commission and the Pennsylvania Public Service Commission as expressly authorized by Section 209 (b) of the Federal Power Act (R. 25). The object of this hearing was to ascertain the facts relating to: (1) the ownership, operation, and management of respondents; (2) contracts and working arrangements between re-

spondents and their affiliates; and (3) expenditures made and obligations incurred under such contracts and working arrangements which in any way affected or related to the business of respondents (R. 25). The order and notice of hearing included a paragraph directing respondents and certain designated affiliates, with whom respondents had business transactions during 1934 and 1935, to appear at the hearing and present certain specified information concerning the organization and ownership, in order to determine the extent to which respondents and the designated affiliates were in fact under common control (R. 27).

On February 23, 1937, before the date set for hearing, respondents, purporting to act under Section 313 (a) of the Federal Power Act, filed a so-called "Petition for Rehearing," seeking to vacate the order of January 26, 1937, for want of jurisdiction over some of the parties and over the subject matter of investigation (R. 13). The Commission continued *sine die* the order and notice of hearing of January 26, 1937 (R. 29, 35), thereby relieving the respondents and the designated affiliates from appearing and producing the information requested on March 3, 1937.

On March 23, 1937, the Commission, treating the so-called "Petition for Rehearing" as a plea to the Commission's jurisdiction, granted the same and set the matter for hearing (R. 47, 49). At the hearing before an Examiner, which commenced on

April 14, 1937, respondents introduced evidence tending to establish that the purpose of the Commission in adopting the order of January 26, 1937, was to obtain information to aid the Pennsylvania Public Service Commission and that three of the respondents were engaged wholly in intrastate business (R. 6). At the conclusion of the presentation of this evidence by respondents, the Commission's counsel introduced evidence tending to establish the jurisdiction of the Commission over the respondents in this inquiry (R. 47–48). The purpose of counsel in introducing evidence was to establish that all of the respondents were public utilities within the meaning of the Federal Power Act or licensees of the Federal Power Commission, that respondents had entered into certain transactions or working agreements with the persons and companies designated as affiliates of respondents in the order of January 26, 1937, and that the respondents and designated affiliates were under common control (R. 48). The establishment of these facts was essential to the exercise of the power vested in the Commission by Section 301 (c) of the Federal Power Act. Respondents objected to the admissibility of certain evidence on the ground that such evidence was not relevant to the issues presented by the so-called "Petition for Rehearing," but related to matters which they contended might come more properly within the order of January 26, 1937 (R. 6–7). This objection was overruled by the Examiner

with full explanation (R. 8, 30–34).[1] Thereupon respondents applied to the Commission for instructions to be given to the Examiner to confine the testimony in the hearing solely to matters raised by the so-called "Petition for Rehearing" and to define the issues to be determined by the Examiner during the course of that hearing (R. 9, 29–35). On April 20, 1937, the Commission denied the request for the reason that under its rules of practice it was within the functions of the Examiner to rule upon the admissibility of evidence (R. 9). Upon remand to the Examiner he again ruled against the respondents (R. 9).

On April 21, 1937, respondents filed a petition in the United States Circuit Court of Appeals for

[1]The order of the Commission granting the so-called "Petition for Rehearing" (R. 4) also assigned "the matters involved in this proceeding for hearing." Respondents interpreted this assignment for hearing as limited to the issues raised in the so-called "Petition for Rehearing," as distinguished from the investigation. The Examiner interpreted the assignment to relate to the questions raised by respondents, together with any other matters which related to the power of the Commission to issue the order of January 26, 1937. The sole question, therefore, was one of the admissibility of evidence. Respondents in effect said that certain designated respondents were not public utilities within the meaning of the Federal Power Act and that therefore the Federal Power Commission was without authority to examine their books and papers or those of their affiliates. The ruling of the Examiner was to the effect that the Commission must look into the business of these respondents and their books and papers in order to ascertain whether respondents were or were not public utilities and whether they had any business transactions with the designated affiliates (R. 33–34).

the Third Circuit praying for a rule to show cause and for a stay of proceedings before the Federal Power Commission (R. 1). The respondents contended that the Commission should be required to limit the pending hearing solely to the jurisdictional question upon which the respondents had introduced evidence (R. 12). The Circuit Court of Appeals on July 6, 1937, issued the rule as prayed (R. 36). The Commission, having made a return to the rule on September 21, 1937, prayed that the rule be discharged, the stay of the proceedings terminated, and the petition dismissed (R. 40–49).

On January 27, 1938, the Court of Appeals, one judge dissenting, rendered its decision (R. 50) restraining the Commission from proceeding with its proposed inquiry and investigation until the "two issues raised" in the so-called "Petition for Rehearing" had been decided by the Commission. By way of direction to the Commission, the majority opinion states: "The relation of the evidence to the two questions involved should be apparent and logical and not far-fetched and remotely inferential. Some of the evidence admitted when the case was before the Federal Commission on rehearing was not relevant and material" (R. 53). The majority opinion of the court below held in effect that the order of January 26, 1937, was an appealable order under Section 313 (b) of the Federal Power Act and that it possessed appellate jurisdiction under Section 262 of the Judicial Code to protect its jurisdiction

to review such order. The cause was ordered "remanded" to the Commission, although the case had not come to the Court of Appeals on appeal. The dissenting opinion of Judge Biggs (R. 54–62), after a review of pertinent decisions not adverted to in the majority opinion, concluded that the order of January 26, 1937, was not an appealable order; that hence there was at this time no appellate jurisdiction to protect under Section 262 of the Judicial Code; that the court therefore was without power to issue an injunction; and that the result of the decision sanctioning judicial intervention in administrative proceedings would be to "emasculate the Federal Power Act and render the Commssion unable to pass upon the very matters for which it was created" (R. 59).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that an interim or procedural order, interlocutory in its nature, is a reviewable order under the provisions of Section 313 of the Federal Power Act.

2. In holding that Section 262 of the Judicial Code conferred authority on the court to grant the relief prayed for.

3. In supervising the proffer of evidence in the course of an administrative hearing before the Federal Power Commission and in limiting the issues upon which evidence might be received.

4. In failing to hold that respondents had a plain, adequate, and complete remedy at law, and that their administrative remedies had not been exhausted.

5. In failing to dismiss respondents' petition.

SUMMARY OF ARGUMENT

1. The court below was without jurisdiction. The "all writs" section of the Judicial Code (Sec. 262), under which respondents sought an injunction, has no application. No appellate jurisdiction of the Court of Appeals with respect to the matter in controversy exists. The order of January 26, 1937, setting down an investigation for hearing, is an interim procedural order, not final, and not appealable. So far as appears, the investigation will not even culminate in an appealable order. In the guise of attempting to protect a nonexistent appellate jurisdiction of the court, respondents are seeking to prevent the presentation of evidence in an administrative hearing upon which the Commission may determine its jurisdiction over respondents.

2. Even if an appealable order existed, so as to create prospective appellate jurisdiction in the court below, the granting of injunctive relief was an abuse of power. Such intervention in the course of an administrative hearing is a departure from established principles of judicial administration, recently restated by this Court in *Myers* v. *Bethlehem Shipbuilding Corp.*, decided January

31, 1938. There were no considerations to justify this extraordinary action. If there is any disadvantage to respondents from the mere reception of the evidence proffered, it is an ordinary incident of litigation. The Commission, however, is prevented from developing a record which it deems necessary for the intelligent determination of its own jurisdiction over respondents. The inappropriateness of such intervention is reflected in the character of the decree below, which sets forth so vague a requirement as to the relevancy of evidence admissible before the examiner that the Commission cannot know whether it is acting in accordance with or in disobedience to the injunction.

ARGUMENT

I

THE COURT BELOW WAS WITHOUT JURISDICTION, SINCE THERE WAS NO APPEALABLE ORDER AND HENCE NO APPELLATE JURISDICTION IN AID OF WHICH THE DECREE BELOW COULD BE ISSUED

The injunction obtained in the case at bar was not sought to protect respondents against the compulsory production of evidence. It was sought to limit the scope of the hearing then in progress before an examiner of the Federal Power Commission, and specifically to limit the reception of evidence proffered by officers of the Commission.

The respondents' petition to enjoin the hearing before the Examiner was presumably based, as

stated in the dissenting opinion of Judge Biggs, on Section 262 of the Judicial Code (U. S. C., Title 28, Sec. 377). That section authorizes the Federal courts "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." It is submitted that the court below was without jurisdiction, because the writ sought was not in aid of any appellate jurisdiction of the court.

There was no appeal pending in the Circuit Court of Appeals when the petition of respondents was filed there. Nor has any appeal subsequently been taken. The assumption on which respondents have proceeded is that the order and notice of hearing of January 26, 1937, was an order from which an appeal would lie to the Circuit Court of Appeals under Section 313 (b) of the Federal Power Act. But that assumption, we submit, is erroneous, and hence respondents' case should have been held by the Court of Appeals to fail at the outset.

The order of January 26, 1937, was an initial, not a final, order, and so cannot be regarded as appealable under Section 313 (b) of the Act. The Act, in providing for an appeal from "an order" of the Commission, indicates that orders which are merely interlocutory or procedural, entered properly without prior hearing, based on no record, and embodying no judgment cannot be reviewed on appeal to a Circuit Court of Appeals.

The Act provides, in Section 313, prescribing the requirements for appeal, that the Commission must certify and file with the court a "transcript of the record" upon which the order complained of was entered; that the "findings" of the Commission as to the facts, if supported by substantial evidence, shall be conclusive; that "additional" evidence may be adduced before the Commission upon leave of court if there were reasonable grounds for failure to adduce such evidence theretofore. These provisions of the statute must be ignored if mere interim, procedural, or interlocutory orders of the sort here involved, setting down for hearing a question of jurisdiction in the course of an investigation, can be reviewed on direct appeal to a Circuit Court of Appeals.[2]

The holding of the majority of the court below, that the order could be appealed, ignores also the settled course of decisions governing appealabil-

[2] In their brief in opposition (p. 19) respondents misstate the basis of the decision in *American Sumatra Tobacco Corp.* v. *Securities & Exchange Commission*, 93 F. (2d) 236 (App. D. C.). That case held that an order of the Securities and Exchange Commission denying an application for confidential treatment of certain data in a registration statement was appealable. As a basis for its decision that court ruled that a hearing was necessary to support such an order, and that hence the statutory requisites for appealability were present. Without conceding the correctness of that decision, it is manifestly inconsistent with respondent's contention in the present case, for here confessedly no prior hearing was required to support the order of January 26, 1937, and the so-called petition for rehearing could have been denied summarily.

ity of both judicial and administrative orders. It is clear that, except where specific statutory exception is made, an appellate court will not review interlocutory rulings made during the course of proceedings in an inferior court. *McLish* v. *Roff*, 141 U. S. 661. The reasons for this rule in the case of judicial proceedings were stated in *American Construction Company* v. *Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372. To review by mandamus a ruling or interlocutory orders made in the course of a trial would, the Court said (p. 379):

> * * * "be a plain evasion of the provision of the act of Congress that final judgments only should be brought before this court for re-examination;" would "introduce the supervising power of this court into a cause while depending in an inferior court, and prematurely to decide it;" would allow an appeal or writ of error upon the same question to be "repeated, to the great oppression of the parties;" and "would subvert our whole system of jurisprudence." *Bank of Columbia* v. *Sweeny*, 1 Pet. 567, 569; *Life & Fire Ins. Co.* v. *Adams*, 9 Pet. 573, 602.

With respect to orders of administrative agencies which are not final, the reasons for non-reviewability are even more compelling. To review such orders would involve pervasive supervisory power over administrative matters and the assumption of administrative functions, and would set at naught the rule that administrative remedies must be exhausted before resort may be had to the courts.

Porter v. *Investors' Syndicate,* 286 U. S. 461. These principles have had frequent application.

In *Chamber of Commerce* v. *Federal Trade Commission,* 280 Fed. 45, the Circuit Court of Appeals for the Eighth Circuit was asked to set aside an order of the Federal Trade Commission denying motions to dismiss a complaint set down for hearing before the Commission. That court said (p. 48):

> It is our judgment that neither the District Court nor this court has power under the act to interfere with the investigation and inquiry of the Commission, involving the taking of testimony and the finding of facts essential to the making of such an order as shall ultimately be passed upon by the Circuit Court of Appeals for enforcement, affirmance, modification, or setting aside.

Likewise, in *Jones* v. *Securities and Exchange Commission,* 79 F. (2d) 617 (C. C. A. 2d), the Circuit Court of Appeals dismissed for want of jurisdiction an appeal from an order of the Commission denying permission to withdraw a registration statement although the statute granted a right of review to "any person aggrieved by an order of the Commission." This Court denied certiorari, 297 U. S. 705, on the same day that it granted certiorari in a companion case arising out of an order of the District Court requiring obedience to a subpena, 297 U. S. 699. In deciding the latter case this Court held (298 U. S. 1) that the petitioner had a right to withdraw his registra-

tion statement filed with the Securities and Exchange Commission. When that question had been sought to be reviewed on direct appeal to the Court of Appeals from the Commission's ruling, however, the appeal was properly dismissed for want of jurisdiction. See also *Securities & Exchange Commission* v. *Andrews*, 88 F. (2d) 441 (C. C. A. 2d).

Again, in *Ames-Baldwin-Wyoming Company* v. *National Labor Relations Board*, 73 F. (2d) 489 (C. C. A. 4th), petitioner sought to review an order of the National Labor Relations Board (organized under Act of June 19, 1934, c. 677, 48 Stat. 1183), whose orders were subject to review by the Circuit Courts of Appeals in the same manner as the orders of the Federal Trade Commission. In that case the Board ordered petitioner to hold an election to determine the proper representation of its employees. The order concluded with the warning that if the petitioner did not comply, the matter would be referred to the Compliance Division of the National Recovery Administration. Since further action by an administrative agency had to be taken before the order became final, the Circuit Court of Appeals dismissed the petition for want of jurisdiction.

Where the administrative order relates to the initiation or progress of a hearing, the allowance of an appeal violates traditional canons of judicial administration. Those canons have recently been restated by this Court in *Myers* v. *Bethlehem Shipbuilding Corporation*, decided January 31,

1938, No. 181. As was there observed, attempts to enjoin administrative hearings on the ground of want of jurisdiction, needless burden and expense, and injury to credit and goodwill have repeatedly been rejected. See also *Federal Trade Commission* v. *Claire Furnace Co.,* 274 U. S. 160; *Bradley Lumber Co.* v. *National Labor Relations Board,* 84 F. (2d) 97 (C. C. A. 5th); *Macfadden Publications* v. *Federal Trade Commission,* 37 F. (2d) 822 (App. D. C.); *Minneapolis Chamber of Commerce* v. *Federal Trade Commission,* 280 Fed. 45 (C. C. A. 8th). It is not to be supposed that Congress intended a different result to be reached under the Federal Power Act.

The court below regarded the words "an order" in Section 313 as equivalent to "any order." But even where the latter term is employed, as in the provision of the Urgent Deficiencies Act of 1913 giving jurisdiction to the District Courts to set aside "any order" of the Interstate Commerce Commission, many kinds of orders are not reviewable. There is no jurisdiction to review orders which are in effect findings of fact, *United States* v. *Los Angeles & Salt Lake R. R. Co.,* 273 U. S. 299; or orders which are negative in character, *Procter and Gamble* v. *United States,* 225 U. S. 282, or orders which affect only the carrier and not the shippers or a large part of the public, *United States* v. *Griffin and Purvis, Receivers,* decided February 28, 1938, No. 63.

Particularly relevant are the decisions holding

non-reviewable under the Urgent Deficiencies Act orders instituting a proceeding. In *United States* v. *Illinois Central Railroad Co.*, 244 U. S. 82, the Interstate Commerce Commission assigned for hearing certain complaints filed with it. Suit was brought under the Urgent Deficiencies Act to set aside, annul, or suspend the order of the Commission. It was argued that the Commission lacked jurisdiction to hold the hearing, that the company would be subjected thereby to needless burden and expense, and that an order of reparation entered at the conclusion of the hearing would constitute *prima facie* evidence in suits brought against the carrier on the basis of the awards. Despite these contentions, this Court held that the order was not reviewable. The *Illinois Central* case was followed in *New York, O. and W. Ry. Co.* v. *United States*, 14 F. (2d) 850, so as to preclude review of an order of the Commission reopening a valuation proceeding in respect of items therein never objected to by the carrier. Despite the question raised as to the authority of the Commission, and the allegations of burden and expense to the railroad, the court held that review did not extend to orders "relating to practice or procedure" (p. 851). This decision was affirmed *per curiam* in 273 U. S. 652.

In addition to the fact that the order of January 26, 1937, is merely interlocutory and procedural, and hence not appealable, it may be questioned whether it is an order in a "proceeding" within the meaning of Section 313 of the Act. The order was

entered in an investigation which for aught that appears would not even culminate in an appealable order. Cf. *United States* v. *Los Angeles R. R. Co.*, 273 U. S. 299.

Respondents invoked the extraordinary power of the court below in aid of an appellate jurisdiction which does not exist. No rights of respondents which are entitled to judicial protection will become "moot", as the court below thought. The only right which respondents can suggest will become moot is the supposed right to prevent the reception of evidence deemed to be irrelevant. In short, respondents contest the power of the Commission to hold the hearing set by the order of January 26, 1937, or to present any evidence therein; the compulsory feature of the order, requiring attendance with books and records, is not the object of attack. If it were, the answer would be the same, for the statute provides special procedures for the enforcement of subpenas and does not contemplate appeals from the issuance thereof to the Circuit Courts of Appeals.[3] See *Myers* v. *Bethlehem Ship-*

[3] Upon refusal to produce the information required, the Commission may, under Section 307 of the Act, apply to any court of the United States, within the jurisdiction of which the investigation is carried on, or where the respondents reside or do business, for an order requiring respondents to give information. Failure to obey such order of the court may be punished by the court as a contempt thereof. The statute further provides that if the Commission issues a subpena and the respondents willfully refuse to obey it, they may be subjected to a fine of $1,000 per day, or, in the case of natural persons, to an imprisonment. Having provided these remedies, Congress evidently

ping Corp., decided January 31, 1938, No. 181. The insistence of respondents that they may forestall the reception of evidence at an administrative hearing in order to preserve the appellate jurisdiction of the Court of Appeals, exposes the utter frivolousness of their case; for their case rests on the notion that the mere setting down of a matter for an investigatory hearing constitutes an appealable order. Such a notion, it appears, has found judicial acceptance for the first time in the decision below.

II

IF THE COURT BELOW HAD JURISDICTION, THE GRANTING OF THE INJUNCTION WAS AN ABUSE OF POWER

Even if the order of January 26, 1937, was an appealable order, so that prospective appellate jurisdiction existed, the intervention of the court below in the progress of an administrative hearing is unsupportable. Such intervention, in the words of Section 262 itself, is not in accord with "the usages and principles of law." This statutory limitation on the power of the court to issue extraordinary writs is of special importance in emphasizing the gravity of the decision below.

The canons of judicial administration, recently restated, as observed above, in the *Bethlehem Shipbuilding Corp.* case, forbid the granting of an in-

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did not intend that an order requiring testimony or information in an investigation should be subject to review under Section 313 (b) of the Act.

junction to control the proffer and reception of evidence in an administrative hearing. As was said in *Minneapolis Chamber of Commerce* v. *Federal Trade Commission,* 280 Fed. 45 (C. C. A. 8th), *supra* (p. 47):

> It was not intended that the Circuit Courts of Appeals should be drawn into original conduct of these investigations. If this court is to exercise plenary power and control in determining at the outset what party shall be dealt with, what investigation shall be made, and what recommendation submitted, then it has, in effect, been constituted an original trial tribunal of controversies of this nature. This was in no wise contemplated, nor would it comport with the legimate practical functions of a court of this nature.

The decree below stands, then, as an invasion of the administrative functions of the Commission in supervising the reception of evidence before an examiner. As Judge Biggs observed in his dissenting opinion, "For this court to pass upon such questions during the pendency of a hearing before the Commission is to compel us in effect to sit with the Commission throughout every phase of its inquiry" (R. 59). Such intervention is not only a departure from established principles of judicial administration but raises further questions going to the character of the judicial power conferred by Article III of the Constitution. Cf. *Federal Radio Commission* v. *General Electric Co.,* 281 U. S. 464.

The soundness of the principles which prevent such intervention is attested by the character of the decree herein. The vagueness and indefiniteness of the decree would appear to make it fatally defective under the ordinary rules of equity practice. U. S. Code, Title 28, Sec. 383. Cf. *Landis* v. *North American Co.*, 299 U. S. 248, 253–254. The court also failed to enter findings and conclusions under Equity Rule 70½, though requested to do so by the Commission (R. 63). The vagueness of the decree serves to place in jeopardy an important function of an administrative agency of the Government. The decree recites (R. 62) that the cause is "remanded" to the Commission "for determination in accordance with the opinion of this Court." The opinion states (R. 53) that the evidence admitted should be "strictly confined" to the two issues raised in the petition for rehearing, and that the relation of the evidence to those questions "should be apparent and logical and not far-fetched and remotely inferential." "Some of the evidence admitted," the court added, "was not relevant and material." It is not stated in explanation of the "strict" limitation whether the rules of evidence to be applied should be those applicable to administrative agencies, or to suits in equity, or to jury trials. Nor is it indicated whether a judgment as to admissibility may be affected by the harmless character *vel non* of the proffered evidence. Furthermore, views of strict relevancy may legitimately differ in the circumstances here presented.

For example, if the respondents introduce evidence to show that in accordance with the stock relationships between two corporations, they are not affiliates and, therefore, the Commission has no right to inquire into the book transactions relating to sales, is it competent for the Commission to consider evidence showing that the book transactions are such as would counterbalance the formal evidence concerning stock relationships in determining the affiliations of the two corporations? It is evident that these difficulties may be multiplied, and the only manner in which the Commission may be certain that it is not disobeying the injunction of the Circuit Court of Appeals would be to invite that court to sit with the Commission's Examiner and exercise its veto power on each ruling on admissibility of evidence. Otherwise, the door would be left open to numerous appeals to the Circuit Court of Appeals from rulings of the Examiner, with the result that the investigation on these very jurisdictional questions would be extended indefinitely.

No interest of respondents justified the extraordinary action of the court below. At the very most, their contention is that they are entitled to be free from the presentation of evidence to the Commission by its own officers, with full opportunity to explain or rebut the evidence and reserve exceptions to its relevance.[4] Nowhere in the pleadings

[4] The operation of the subpena in paragraph 2 of the order was indefinitely suspended (R. 29, 35). And in any event, any question as to the validity of the subpena could

below did respondents attempt to show the nature or extent of the damage that would result from such reception of evidence.

The Commission, on the other hand, is engaged in the exercise of important investigatory duties, placed upon it by the statute, in a preliminary effort to determine facts. In the Federal Power Act, Congress adopted a comprehensive scheme for the regulation and control of public utilities engaged in interstate commerce and, in addition to the regulatory functions delegated to the Commission, Congress also found it necessary to authorize and direct the Commission to investigate licensees and public utilities subject to the Federal Power Act.

Section 301 (c) provides that the books, accounts, memoranda, and records of any person who controls, directly or indirectly, a licensee or public utility, and of any other company controlled by such persons insofar as they relate to transactions with, or the business of such licensee or public utility, shall be subject to examination on the order of the Federal Power Commission. Section 307 (a) authorizes the Commission to investigate any facts, conditions, practices, or matters which it may deem necessary or proper in order to determine whether any person has violated, or is about to violate, any provision of the Federal Power Act,

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be raised in a proceeding at law with all appropriate safeguards if and when it was sought to be enforced. *Federal Trade Commission* v. *Claif Furnace Co.*, 274 U. S. 160; *National Gas Pipeline Co.* v. *Slattery*, 302 U. S. 300, 309–310.

or any rule or regulation or order thereunder. By Section 311 of the Act, Congress authorized and directed the Commission to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy, and to secure and keep current information regarding the ownership, operation, management, and control of all facilities for the generation, transmission, distribution, and sale of electric energy.

These and other investigatory powers and functions have been vested by Congress in the Federal Power Commission because such investigations are necessary in the public interest. The importance of this interest far overbalances the ephemeral or imaginary harm which might come to the respondents by disclosure of the information which the Commission sought to consider.

For the reason that important questions of jurisdiction must be decided in the first instance by the Commission, it is particularly necessary that the Commission have an opportunity to base its determination of such questions on an adequate record. Evidence intended to disclose complex corporate interrelationships is of especial relevance in this regard. These questions of jurisdiction will doubtless come before the courts at some later time in an appropriate proceeding. From the standpoint of the courts no less than of the Commission it would be unfortunate if the decision of the Commission on those questions were required to be made upon the basis of a hearing truncated by judicial decree.

CONCLUSION

For the foregoing reasons the judgment of the court below should be reversed and the cause remanded with directions to dismiss.

Respectfully submitted.

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MAY 1938.

APPENDIX

Judicial Code, Section 262 (U. S. C., Title 28, Sec. 377):

> The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law. (R. S. Sec. 716; March 3, 1911, c. 231, Sec. 262, 36 Stat. 1162.)

Federal Power Act, c. 687, 49 Stat. 803 (U. S. C. Sup. II, Title 16, Sec. 825):

> SEC. 301. (c) The books, accounts, memoranda, and records of any person who controls, directly or indirectly, a licensee or public utility subject to the jurisdiction of the Commission, and of any other company controlled by such person, in so far as they relate to transactions with or the business of such licensee or public utility, shall be subject to examination on the order of the Commission.
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> SEC. 307. (a) The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of this Act or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this Act or in pre-

scribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation concerning the matters to which this Act relates. The Commission may permit any person to file with it a statement in writing under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish or make available to State commissions information concerning any such subject.

(b) For the purpose of any investigation or any other proceeding under this Act, any member of the Commission, or any officer designated by it, is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which the Commission finds relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States at any designated place of hearing. Witnesses summoned by the Commission to appear before it shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(c) In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspond-

ence, memoranda, contracts, agreements, and other records. Such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found or may be doing business. Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

* * * * *

SEC. 311. In order to secure information necessary or appropriate as a basis for recommending legislation, the Commission is authorized and directed to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy, however produced, throughout the United States and its possessions, whether or not otherwise subject to the jurisdiction of the Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political sub-

division of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

* * * * *

SEC. 313. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions

as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., Title 28, Secs. 346 and 347).

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